TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1905.

No. 64.

GUSTAV E. HAFEMANN, PLAINTIFF IN ERROR,

vs.

FRED A. GROSS, ALBERT F. GROSS, AND LOUIS H. GROSS.

IN ERROR TO THE SUPREME COURT OF THE STATE OF MINNESOTA.

FILED JULY 25, 1905.

(19,422.)

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., JUNE 27, 1905.

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1 STATE OF MINNESOTA:

In Supreme Court, April Term, A. D. 1904.

GUSTAV E. HAFEMANN, Plaintiff in Error,
vs.
FRED A. GROSS, ALBERT F. GROSS, and LOUIS H. GROSS, Defendants in Error.

To the honorable chief justice of the supreme court of the State of Minnesota:

The petition of Gustav E. Hafemann respectfully shows that on the 28th day of June A. D. 1904, the supreme court of the State of Minnesota rendered a judgement against your petitioner in a certain cause wherein your petitioner was defendant and appellant, and the said Fred A. Gross, Albert F. Gross, and Louis H. Gross were plaintiffs and respondents, as will appear by reference to the records and proceedings in the said cause; the said supreme court of the State of Minnesota is the highest court of said State in which a decision and judgement in said cause could be had.

And your petitioner claims the right to remove said judgement to the Supreme Court of the United States by writ of error, under the statute of the United States, to-wit, section 709 of the Rebised Statutes of the United States, because in said cause and in said judgement of the supreme court of the State of Minnesota there was specially set up and claimed by your petitioner a title, right, privilege and immunity under a statute of the United States and the decision of the said the supreme court of the State of Minnesota was against the title, right, privilege and immuntity thus specially set up and claimed by your petitioner, Gustav E. Hafemann, all of which appears by the recodr of the proceedings in said cause, which is herewith submitted.

Wherefore your petitioner prays for the allowance of a writ of error, returnable into the Supreme Court of the United States for the correction of the errors so complained of, and for citation and supersedeas; and he will ever pray &c.

GUSTAV E. HAFEMANN, Petitioner.

2 ROGER S. POWELL &
JED L. WASHBURN,
Attorneys for Petitioner, Duluth, Minnesota.

STATE OF MINNESOTA, }
County of St. Louis, } ss:

Roger S. Powell, being duly sworn, upon oath, deposes and says that he is one of the attorneys for the petitioner, Gustaf E. Hafe-

mann, in the foregoing petition, and that the contents of said petition are true to his own knowledge.

ROGER S. POWELL.

Subscribed and sworn to before me this 30th day of June A. D. 1904.

CHAS. M. START,
Chief Justice of Supreme Court of Minn.

3 [Endorsed:] 13879 Copy Petition for writ Fred A. Gross *et al.* respondents *vs.* Gustav E. Hafemann appellant. Endorsed: Filed July 12, 1904 C. A. Pidgeon clerk.

4 STATE OF MINNESOTA:

In Supreme Court, April Term, A. D. 1904.

FRED A. GROSS, ALBERT F. GROSS, and LOUIS H. GROSS, Plaintiffs and Respondents,
vs.
GUSTAV E. HAFEMANN, Defendant and Appel-ant.

Order.

Upon motion of Roger S. Powell, Esq, one of the attorneys for appel-ant, and upon filing a petition for a writ of error and an assignment of errors—

It is ordered, that a writ of error be, and hereb- is allowed, to have reviewed in the Supreme Court of the United States the judgement heretofore entered in the above entitled cause and the amount of the bond of said writ of error be, and the same is hereby fixed at three thousand dollars ($3000.00) the same to operate as a supersedas.

Dated June 30th, 1904.

(Signed) CHAS. M. START,
Chief Justice of the Supreme Court of Minnesota.

5 [Endorsed:] 13879 Order allowing writ Copy Endorsed: Filed July 12—1904 C. A. Pidgeon clerk

6 UNITED STATES OF AMERICA, ss:

The President of the United States of America to the honorable judges of the supreme court of the State of Minnesota, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said supreme court of the State of Minnesota, before you or some of you, being the highest court of law or equity of the said State in which a decision could be had

in the said suit or action between Gustav E. Hafemann, appellant and plaintiff in error, and Fred A. Gross, Albert F. Gross and Louis H. Gross, respondents and defendants in error, wherein was specially set up and claimed by the said Gustav E. Hafemann, plaintiff in error, a title, right, privilege and immunity under a statute of the United States and the decision of the said supreme court of the State of Minnesota was against the title, right, privilege, and immunity thus specially set up and claimed under such statute, a manifest error hath happened, to the great damage of the said Gustav E. Hafemann, plaintiff in error, as by his complaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the supreme court of the United States, together with this writ, so that you may have the same in the said Supreme Court, at Washington, on the 7th day of August A. D. 1904, in the said Supreme Court, to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, the 8th day of July in the year of our Lord, one thousand nine hundred and four.

HENRY D. LANG,
Clerk of U. S. Circuit Court
for the Distri . of Minnesota.

Allowed (to operate as supersedeas).

[Seal U. S. Circuit Court, Dist. of Minnesota, Third Division.]

CHAS. M. START,
Chief Justice of the Supreme Court
of the State of Minnesota.

[Endorsed:] 13879 Original Fred A. Gross *et al.* vs. Gustav E. Hafemann *et al.* Writ of error.

Citation.

UNITED STATES OF AMERICA, ss:

To Fred A. Gross, Albert F. Gross, and Louis H. Gross, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within thirty days from the date hereof, pursuant to a writ of error filed in the clerk's office of the supreme court of the State of Minnesota, wherein Gustav

E. Hafemann is the plaintiff in error and you are defendants in error, to show cause, if any there be, why the judgment rendered against the plaintiff in error, as in the said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in this behalf.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States of America, this 8th day of July in the year of our Lord, one thousand nine hundred and four.

CHAS. M. START,
Chief Justice of the Supreme Court
of the State of Minnesota.

Service of within citation and receipt of a copy thereof admitted this 9th day of July, A. D. 1904.

JNO. E. DAVIES,
Attorney for Defendants in Error.
THEO. HOLLISTER,
Of Counsel.

10 [Endorsed:] 13879 Original Citation Fred A. Gross *et al.* respondents vs. Gustav E. Hafemann appellant

11 STATE OF MINNESOTA:

In Supreme Court, April Term, A. D. 1904.

GUSTAV E. HAFEMANN, Defendant, Appellant, and Plaintiff in Error,
vs.
FRED A. GROSS, ALBERT F. GROSS, and LOUIS H. GROSS, Plaintiffs, Respondents, and Defendants in Err-.

Know all men by these presents, that we, Gustav E. Hafemann, as principal, and August Grochau and Rina H. Powell, as sureties, are held and firmly bound unto Fred A. Gross, Albert F. Gross, and Louis H. Gross in the full and just sum of three thousand dollars ($3000.) to be paid to the said Fred A. Gross, Albert F. Gross and Louis H. Gross, their certain attorneys, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally, firmly by these presents.

Sealed with our seals and dated this 30th day of June in the year of our Lord, one thousand nine hundred and four.

Whereas lately, at a session of the supreme court of the State of Minnesota, in a suit or action pending in said court between Gustav E. Hafemann, defendant and appellant and Fred A. Gross, Albert F. Gross and Louis H. Gross, plaintiffs and respondents, a final judgment was rendered against the said Gustav E. Hafemann, de-

fendant and appellant, and the said defendant and appellant having obtained the allowance of a writ of error and filed a copy thereof in the clerk's office of the said court to review and reverse the judgment in the foregoing suit or action and a citation directed to Fred A. Gross, Albert F. Gross and Louis H. Gross, citing and admonishing them to be and appear at the Supreme Court of the United States at Washington, within thirty days from the date hereof:

12 Now, therefore, the condition of the above obligation is such that if the said Gustav E. Hafemann shall prosecute his said writ of error to effect and shall answer all damages and costs that may be awarded against him if he fails to make his plea good, then the above obligation to be void, otherwise to remain in full force and virtue.

In witness whereof the said Gustav E. Hafemann, August Grochau and Rina H. Powell have hereunto set their hands and seals the day and year aforesaid.

GUSTAV E. HAFEMANN. [SEAL.]
AUGUST GROCHAU. [SEAL.]
RINA H. POWELL. [SEAL.]

Signed, sealed, and delivered in presence of—
ROGER S. POWELL,
D. W. PADDOCK,
As to Gustav E. Hafemann and August Grochau.
M. SCHEIDE,
P. C. BEERS,
As to Rina H. Powell.

STATE OF MINNESOTA, } ss:
County of St. Louis, }

On this 1st day of July A. D. 1904, before me, a notary public within and for said county, personally appeared Gustav E. Hafemann and August Grochau to me known to be the same persons who executed the foregoing and within bond and they severally acknowledged the same as his free act and deed.

DAVID W. PADDOCK, [NOTARIAL SEAL.]
Notary Public, St. Louis County, Minnesota.

STATE OF MINNESOTA, } ss:
County of St. Louis, }

August Grochau, being duly sworn deposes and says that he is a resident and freeholder of the State of Minnesota, and is worth the sum of six thousand dollars, over and above all just debts, liabilities and responsibilities and exclusive of his property exempt from execution.

AUGUST GROCHAU.

13 Subscribed and sworn to before me this 1st day of July, 1904.

DAVID W. PADDOCK, [NOTARIAL SEAL.]
Notary Public, St. Louis County, Minnesota.

STATE OF PENNSYLVANIA, }
County of Venango, } ss:

On this 5th day of July, A. D. 1904, before me a notary public within and for said county, personally appeared Rina H. Powell, to me known to be the same person who executed the foregoing and within bond and she acknowledged the same as her free act and deed.

MILLARD SCHEIDE, [NOTARIAL SEAL.]
Notary Public, Venango County, Pennsylvania.

Commission will expire February 27, 1905.

STATE OF PENNSYLVANIA, }
County of Venango, } ss:

Rina H. Powell, being duly sworn, deposes and says that she is a resident and freeholder of the State of Minnesota and is worth the sum of six thousand dollars over and above all just debts, liabilities and responsibilities and exclusive of her property exempt from execution.

—— ——.

Subscribed and sworn to before me this 5th day of July, 1904.

MILLARD SCHEIDE, [NOTARIAL SEAL.]
Notary Public, Venango County, Penn.

Commission will expire February 27, 1905.

I hereby approve of the foregoing bond and the sureties therein named.

Dated ——, 8th, 1904.

CHAS. M. START,
Chief Justice of the Supreme Court of Minnesota.

14 [Endorsed:] 13879 Copy Bond Fred A. Gross *et al*, repondents *vs.* Gustav E. Hafemann appellant
Endorsed: Filed July 12, 1904 C. A. Pidgeon clerk

15 Supreme Court of the United States.

GUSTAV E. HAFEMANN, Plaintiff in Error and Appellant,
vs.
FRED A. GROSS, ALBERT F. GROSS, and LOUIS H. GROSS, Defendants in Error and Respondents.

Assignments of Error.

Comes now Gustav E. Hafemann, plaintiff in error, by his counsel, and respectfully represents that he feels himself aggrieved by the proceedings and judgement of the supreme court of the State of Minnesota in the above entitled cause and assigns error thereto, as follows:

1. The court erred in affirming the judgement of the court below.
2. The court erred in not reversing the judgement of the court below and in not directing judgement for the plaintiff in error and against the defendants in error as prayed.
3. The court erred in holding that the contract set out in the complaint of the plaintiffs below was valid and enforceable and was not in conflict with the provisions and requirements of section # 2262 of the Revised Statutes of the United States.

GUSTAV E. HAFEMANN,
Plaintiff in Error,
By ROGER S. POWELL AND
JED L. WASHBURN,
Attorneys for Plaintiff in Error.

16 [Endorsed:] 13879 Copy Assignments of error Fred A. Gross *et al.* respondents vs. Gustav E. Hafemann, appellant. Endorsed: Filed Jul-12 1904 C. A. Pidgeon, clerk.

17 STATE OF MINNESOTA:

Supreme Court.

STATE OF MINNESOTA, } ss:
County of St. Louis, }

I hereby certify and return, that at Duluth, the county and State aforesaid, on the 15th day of May, A. D. 1903, I served the summons and complaint hereto attached upon the within named Gustav E. Haffemann personally, by handing to and leaving with him a true and correct copy thereof.

Dated this 16th day of May, 1903.

Sheriff's fees, service	$1.00
Travel	40
	$1.40

W. W. BUTCHART,
Sheriff, St. Louis County, Minn.,
By H. N. RANDALL,
Deputy Sheriff.

18 STATE OF MINNESOTA, County of St. Louis, } ss:

District Court, Eleventh Judicial District.

FRED A. GROSS, ALBERT F. GROSS, and LOUIS H. GROSS, Plaintiffs,
vs.
GUSTAV E. HAFEMANN, Defendant.

The State of Minnesota to the above named defendant:

You are hereby summoned and required to answer the complaint of the plaintiffs in the above entitled action, of which a copy is hereunto annexed and herewith served upon you, and to serve a copy of your answer to the said complaint on the subscriber, at his office in 400 Lonsdale building, Duluth, in said county, within twenty days after the service of this summons upon you, exclusive of the day of such service; and if you fail to answer the said complaint within the time aforesaid the plaintiffs in this action will take judgment against you for the sum of five thousand and six hundred and twenty-five dollars, with interest at the rate of 6 per cent. per annum from the seventeenth day of July, 1902, together with the costs and disbursements of this action.

Dated April 16th, 1903.

JOHN E. DAVIES,
Plaintiff's Attorney,
400 Lonsdale Building, Duluth, Minnesota.

19 STATE OF MINNESOTA, County of St. Louis, } ss:

District Court, Eleventh Judicial District.

FRED A. GROSS, ALBERT F. GROSS, and LOUIS H. GROSS, Plaintiffs,
vs.
GUSTAV E. HAFEMANN, Defendant.

The plaintiffs above named complaining of the defendant above named and for a cause of action against said defendant, allege:

1st. That on the 1st day of December, 1890, and for some time prior thereto and for some time thereafter, the above named plaintiffs and one Edmund F. Gross were co-partners doing business and making contracts under the firm name and style of Albert F. Gross and Bros. That the general nature of the business of said co-partnership business was the buying and selling of timber and iron lands and city real estate and the locating of persons upon Government lands in St. Louis county and the adjoining counties in the State of Minnesota.

2nd. That on or about the 11th day of October, 1890, the above named plaintiffs and the said Edmund F. Gross, in their said co-partnership capacity, rendered to the said defendant, at his request, valuable services in locating the said defendant upon the following
20 described land, which was then Government land and subject to entry under the pre-emption laws of the United States, to-wit: The southwest one quarter of the northwest one quarter, the north one half of the southwest one quarter and the southwest one quarter of the southwest one quarter of section fourteen (14) all in township fifty-eight (58) north of range nineteen (19) west of the fourth principal meridian in St. Louis county and State of Minnesota, and did cause and procure the said defendant to enter the said land under the pre-emption laws of the United States.

3rd. That on the 1st day of December, 1890, a contract was duly entered into, in writing, between the above named plaintiffs and the said Edmund F. Gross in their said partnership capacity, as parties of the first part thereto, and the said defendant as party of the second part thereto, which contract was duly delivered on said day. That a true copy of said contract is hereto attached, marked Exhibit "A" and made a part of this complaint.

4th. That subsequent to the entry of the above described land by the said defendant, as hereinbefore alleged, the defendant offered his final proof of his pre-emption en ry of said land before the proper officials on or about the 29th day of August, 1891, and a patent was issued to said above named defendant for said land, on or
21 about the 19th day of December, 1891, by the United States Government, and the defendant thereby obtained title to said lands at said time.

5th. The plaintiffs further allege that they, together with the said Edmund F. Gross, did pay one-fourth of all expenses accruing to the defendant in making final proof upon the above and hereinbefore described land and that they and the said Edmund F. Gross have performed all of the conditions and terms of the said contract, by them to be performed.

6th. The plaintiffs further allege that on or about October 18th, 1895, the defendant sold the pine timber on the land hereinbefore described and that he paid to these plaintiffs and the said Edmund F. Gross one-fourth of the amount received for said timber by him in compliance with the terms and conditions of the contract hereinbefore mentioned.

7th. The plaintiffs further allege that on or about the 17th day of July, 1902, the defendant sold and conveyed the land hereinbefore described to the Onondaga Iron Company. And they further allege that they are informed and believe the same to be true that the defendant received in cash for the said land from the said Onondaga Iron Company, the sum of twenty-two thousand five hundred dollars. That under the terms and conditions of said contract, a true copy of which is hereto attached, one-fourth of said amount of

twenty-two thousand five hundred dollars, or five thousand
22 six hundred and twenty-five dollars, is due and owing to these plaintiffs and the said Edmund F. Gross, or his assigns, from the said defendant. That the defendant has failed and refused to pay said amount to these plaintiffs or the said Edmund F. Gross, or his assigns, or any part thereof.

8th. These plaintiffs further allege that for a valuable consideration to him paid by the above named plaintiffs, Albert F. Gross, the hereinbefore mentioned Edmund F. Gross assigned and set over to the said Albert F. Gross on the 21st day of March, 1903, all of his right, title and interest in the aforementioned contract and that the said plaintiff, Albert F. Gross, is now the owner of whatever interest the said Edmund F. Gross may have had in said contract, a true copy of which is the said Exhibit "A" hereto attached.

Wherefore, the plaintiffs demand judgment against the defendant for the sum of five thousand six hundred and twenty-five dollars and interest thereon at the rate of six per cent. per annum from the 17th day of July, 1902, together with the costs and disbursements in this action.

JOHN E. DAVIES,
Attorney for Plaintiffs, 400 Lonsdale Building,
Duluth, Minnesota.

DAVIS, HOLLISTER & WILSON, Of Counsel.

23 EXHIBIT "A."

Articles of Agreement.

This agreement made and entered into this 1st day of December, 1890, by and between Fred A. Gross, Albert F. Gross, Louis H. Gross and Edmund F. Gross, parties of the first part, and Gustav, E. Hafemann, party of the second part, all of Duluth, Minnesota.

Witnesseth: That for and in consideration of the covenants hereinafter mentioned, the parties of the first part agree to pay one-fourth of all expenses accruing to the party of the second part in making final proof to the S. W. ¼ of the N. W. ¼, the N. ½ of the S. W. ¼ and the S. W. ¼ of S. W. ¼ of sec. 14, all in township 58 north of range 19 west in St. Louis county, Minn., and receiving title thereto, and the party of the second part agrees and binds himself to pay to the parties of the first part, one hundred dollars in cash upon the delivery of these presents for locating him on said land, and he further agrees to give the party of the first part one-fourth part of the price and proceeds that may be hereafter obtained for the sale of said lands after he has obtained title thereto from the United States, deducting the one-fourth expenses as above provided and can find a purchaser for, and sell the same at its proper value.

24 In witness whereof the parties hereto have signed their names to this contract the day and year above mentioned.

ALBERT F. GROSS & BROS.
GUSTAV E. HAFEMANN.

Attest:
T. J. MITCHELL,
A. E. GROCHAU.

Filed in my office at — o'clock — m. June 20, 1903.

J. P. JOHNSON,
Clerk District Court,
By H. A. LIEDEL, Deputy.

STATE OF MINNESOTA, County of St. Louis, } ss:

In District Court, Eleventh Judicial District.

FRED A. GROSS, ALBERT F. GROSS, and LOUIS H. GROSS, Plaintiffs,
vs.
GUSTAV E. HAFEMANN, Defendant.

The defendant, answering the complaint of the plaintiffs herein denies each and every allegation, matter and thing in said complaint contained, that is not hereinafter specifically admitted, qualified, or explained.

Admits the allegations contained in paragraphs numbered "1st," "3rd," "4th," "5th," "6th," and "8th" of the complaint.

25 Admits the allegations contained in paragraph numbered "2nd" of said complaint, excepting the allegation that the plaintiffs did cause and procure the defendant to enter said land, on or about the 11th day of October, 1890, and alleges that the defendant filed a declaratory statement of his intention to purchase said land on the 16th day of October, A. D. 1890, but did not make entry upon, nor final proof on, nor payment for said lands until the 29th day of August, A. D. 1891.

Admits that, on the 17th day of July, A. D. 1902, the defendant sold and conveyed the land described in the complaint to the Onondaga Iron Company, as alleged in paragraph "7th" of the complaint, but denies that this defendant received for said lands the sum of twenty-two thousand five hundred dollars ($22,500.00) or any other or greater sum than seven thousand five hundred dollars ($7,500).

Further answering,

Defendant alleges that, at the time the contract, set out in plaintiffs' complaint as "Exhibit A" was entered into, to-wit, on the 1st day of December, A. D. 1890, the lands described in said contract,

being the same lands described in the complaint herein, were public lands and belonged to the United States Government, and that defendant, at said time, had acquired nothing more than a preferential right to purchase said lands from the General Government, under the pre-emption laws of the United States; that said contract
26 was entered into in contemplation of the defendant's thereafter acquiring title to the lands therein described, from the General Government of the United States, under the provisions of the pre-emption law; and, therefore and for that reason, this defendant alleges further, upon information and belief, that the said contract was and is against public policy and void, and was and is in contravention of the terms of the pre-emption laws of the United States.

Wherefore, defendant demands that he be hence dismissed with judgment for the costs and disbursements in this behalf expended.

ROGER S. POWELL,
Attorney for Defendant.

STATE OF MINNESOTA, }
County of St. Louis, } ss:

Gustav E. Hafemann, being first duly sworn, deposes and says that he is the defendant herein, that he has read the foregoing answer and knows the contents thereof, and the same is true of his own knowledge, excepting as to the matters therein stated upon information and belief, and as to those matters he believes it to be true.

GUSTAV E. HAFEMANN.

Subscribed and sworn to before me this 11th day of December, A. D. 1903.

[NOTARIAL SEAL.]

U. C. TOWER,
Notary Public,
St. Louis County, Minn.

27 Due and personal service of within answer is hereby admitted by copy this — day of December 1903.

JNO. E. DAVIES,
Attorney for Plaintiff.

Filed in my office at — o'clock — m., Jan. 6, 1904.

J. P. JOHNSON,
Clerk District Court,
By H. A. LIEDEL, Deputy.

STATE OF MINNESOTA, County of St. Louis, } ss:

District Court, Eleventh Judicial District.

FRED. A. GROSS, ALBERT F. GROSS, and LOUIS H. GROSS, Plaintiffs,
vs.
GUSTAF E. HAFEMANN, Defendant.

SIR: You will please to take notice, that the issue of fact in the above entitled action will be brought on for trial at the next general term of the district court to be held in and for the county of St. Louis at the court house, in the city of Duluth in said county, on the 6th day of January, A. D. 1904, at the opening of said court on that day, or as soon thereafter as counsel can be heard.

Dated Dec. 28th, 1903.

Yours respectfully,

JOHN E. DAVIES,
Attorney for Plaintiffs.

To Roger S. Powell, attorney for defendant.

28 Due service of the within notice is hereby admitted this 29 day of Dec., 1903, at Duluth, Minn.

R. S. POWELL,
Attorney for Defendant.

Filed in my office at — o'clock — m., Jan. 4, 1904.

J. P. JOHNSON,
Clerk District Court,
By H. A. LIEDEL, Deputy.

WEDNESDAY, January 6th, 1904.

STATE OF MINNESOTA, County of St. Louis, } ss:

District Court, Eleventh Judicial District.

The January general term of the above named court was on the sixth day of January, 1904, at 10 o'clock in the forenoon duly declared opened by the sheriff of said county at the court house in the city of Duluth in said county and State, officers present, Hon. Homer B. Dibell, judge, presiding, Hon. J. D. Ensign, judge, Hon. Wm. A. Cant, judge, J. P. Johnson, clerk, W. W. Butchart, sheriff.

Ordered that the clerk appoint four deputy clerks. Whereupon the clerk appointed the following deputies: U. G. Holloway, Alexander S. Hamilton, V. A. Dash for the court rooms, and Henry A. Liedel for general duty.

29 A call of the calendar was had and actions were reported as follows:

36

18538

Reported for trial by jury.
Plaintiff moves for judgment on pleadings.
Court adjourns.

J. P. JOHNSON, Clerk,
By U. G. HOLLOWAY, Deputy.

STATE OF MINNESOTA, } ss.:
County of St. Louis, }

District Court, Eleventh Judicial District.

FRED A. GROSS, ALBERT F. GROSS, and LOUIS H. GROSS, Plaintiffs,
vs.
GUSTAV E. HAFEMANN, Defendant.

Order Granting Motion for Judgment on the Pleadings.

The above entitled action came regularly on for hearing before the court at the January, 1904, general term thereof, upon the motion of said plaintiffs for judgment on the pleadings in their favor and against said defendant for the sum of $1875.00, and interest thereon from July 17, 1902, at the rate of six per cent. per annum, John E. Davies appearing for said plaintiff- and Roger S. Powell appearing for said defendant.

And the court having duly considered said motion, and the arguments of counsel,

30 It is ordered, that said motion be granted, and that judgment be entered herein in favor of said plaintiffs and against said defendant in the sum of $1875.00, with interest thereon at the rate of six per cent. per annum from July 17, 1902, together with plaintiffs' costs and disbursements herein.

Let judgment be entered accordingly.

By the court:

HOMER B. DIBELL,
Judge of said Court.

Dated Jan. 8, 1904.

Filed in my office at — o'clock — m., Jan. 8, 1904.

J. P. JOHNSON,
Clerk District Court,
By H. A. LIEDEL, Deputy.

STATE OF MINNESOTA, County of St. Louis, } ss:

District Court, Eleventh Judicial District.

FRED A. GROSS, ALBERT F. GROSS, and LOUIS H. GROSS, Plaintiffs,
vs.
GUSTAV E. HAFEMANN, Defendant.

The above entitled action came regularly on for hearing before the court at the January, 1904, general term thereof, upon the motion of said plaintiffs for judgment on the pleadings, in their favor and against said defendant, for the sum of $1875.00, and interest thereon from July 17, 1902, at the rate of six per cent. per
31 annum, John E. Davies appearing for said plaintiff- and Roger S. Powell appearing for said defendant.

And the court having duly considered said motion, and the arguments of counsel did on the 8th day of January, 1904, make and file its order granting said motion and directing that judgment be entered in favor of said plaintiff- and against said defendant,

Now, therefore, pursuant to said order it is adjudged and decreed that plaintiffs, Fred A. Gross, Albert F. Gross and Louis H. Gross have and recover of the defendant, Gustav E. Hafemann the sum of $2042.15, damages and interest, together with $15.65 costs and disbursements as taxed and allowed, amounting in all to $2057.80.

Witness the Honorable Homer B. Dibell, judge of the district court aforesaid, at Duluth, Minn., this 12th day of January, 1904.

[Seal of District Court, St. Louis County, Minn.]

J. P. JOHNSON, Clerk,
By H. A. LIEDEL, Deputy.

Filed in my office at — o'clock — m., Jan. 12, 1904.

J. P. JOHNSON,
Clerk District Court,
By H. A. LIEDEL, Deputy.

32 STATE OF MINNESOTA, County of St. Louis, } ss:

District Court, Eleventh Judicial District.

FRED A. GROSS, ALBERT F. GROSS, and LOUIS H. GROSS, Plaintiffs,
against vs.
GUSTAV E. HAFEMANN, Defendant.

You will please take notice, that the above named defendant appeals to the supreme court of the State of Minn., from the judgment

of this court in this action, entered on the 12th day of Jan., 1904, adjudging that the plaintiffs recover of the defendant the sum of two thousand and fifty-seven dollars and ninety cents, and from the whole of said judgment.

Dated February 26, 1904.

ROGER S. POWELL,
Attorney for Defendant.

To John E. Davies, Esq., attorney for plaintiffs, and J. P. Johnson, Esq., clerk of the district court; Theodore Hollister, Esq., of counsel.

33 Due and personal service of within notice of appeal by delivery of copy thereof is hereby admitted this 26th day of February, 1904.

JOHN E. DAVIES,
Attorney for Plaintiffs.
J. P. JOHNSON,
Clerk of District Court.

Filed in my office at — o'clock — m., March 2, 1904.
J. P. JOHNSON,
Clerk District Court,
By ALEX. S. HAMILTON, Deputy.

STATE OF MINNESOTA, County of St. Louis, } ss:

District Court, Eleventh Judicial District.

FRED A. GROSS, ALBERT F. GROSS, and LOUIS H. GROSS, Plaintiffs,
vs.
GUSTAV E. HAFEMANN, Defendant.

Know all men by these presents, that we Gustav E. Hafemann as principal, and Augustus Grochau and Rina H. Powell as sureties, are held and firmly bound unto Fred A. Gross, Albert F. Gross and Louis H. Gross, plaintiffs in the above entitled action in the sum of twenty-five hundred dollars, lawful money of the United States, to be paid unto the said Fred A. Gross, Albert F. Gross and Louis H. Gross, their heirs, executors, administrators or assigns, for which payment well and truly to be made we jointly and severally bind
34 ourselves, our heirs, executors and administrators, firmly by these presents.

Sealed with our seals and dated this 14th day of March, 1904.

The condition of this obligation is such, that whereas the said Gustav E. Hafemann has appealed to the supreme court of the State of Minnesota, from a certain judgment entered in the above-named court on the 12th day of January, 1904, in the above entitled action

adjudging that the plaintiffs therein named recover of the defendant therein named the sum of two thousand and fifty-seven dollars and ninety cents.

Now, therefore, if the said defendant, Gustav E. Hafemann shall pay all costs which may be awarded against him on said appeal and shall pay the amount directed to be paid by said judgment or the part of such amount as to which the judgment shall be affirmed if affirmed in part only and shall pay all damages which shall be awarded against him, the said Gustav E. Hafemann, upon said appeal then this obligation shall be void; otherwise to remain in full force.

In testimony whereof, we have hereunto set our hands and seals this 14th day of March, A. D. 1904.

GUSTAV E. HAFEMANN. [SEAL.]
AUGUSTUS GROCHAU. [SEAL.]
RINA H. POWELL. [SEAL.]

Signed, sealed and delivered in presence of
ROGER S. POWELL.
E. H. HALL.

35 STATE OF MINNESOTA, } ss:
County of St. Louis, }

On this 14th day of March, A. D. 1904, before me, a notary public within and for said county, personally appeared Gustav E. Hafemann, Augustus Grochau and Rina H. Powell, to me known to be the persons described in and who executed the foregoing instrument, and acknowledged that they executed the same as their free act and deed.

[NOTARIAL SEAL.] E. H. HALL,
Notary Public, St. Louis County, Minnesota.

STATE OF MINNESOTA, } ss:
County of St. Louis, }

Augustus Grochau and Rina H. Powell, being duly sworn, says each for himself, that he is one of the sureties within named, that he is a resident and free-holder of the State of Minnesota, and worth the amount of five thousand dollars ($5,000.00) (being double the amount specified in the within bond) above his debts and liabilities and exclusive of his property exempt from execution.

AUGUSTUS GROCHAU.
RINA H. POWELL.

Subscribed and sworn to before me this 14th day of March, A. D. 1904.

[NOTARIAL SEAL.] E. H. HALL,
Notary Public, St. Louis County, Minn.

Due service of within bond and approval thereon by service of copy is hereby admitted this 15th day of March, 1904.

JOHN E. DAVIES,
Attorney for Plaintiffs.

I hereby approve the within bond and the sureties therein contained, this 15th day of March, A. D. 1904.

HOMER B. DIBELL, Judge.

Filed in my office at — o'clock — m. March 16, 1904.

J. P. JOHNSON,
Clerk, District Court.
By H. C. WEDMARK, Deputy.

Clerk's Certificate.

STATE OF MINNESOTA, } ss:
County of St. Louis, }

District Court, Eleventh Judicial District.

I, J. P. Johnson, clerk of the district court, St. Louis county, and State of Minnesota, do hereby certify that I have compared the foregoing papers writing with the original summons, complaint, and return of service; answer; notice of trial entry in court journal showing motion for judgment on pleadings; order granting motion; judgment notice of appeal and bond on appeal in the action
37 therein entitled, now remaining of record in my office, and that the same is a true and correct copy and transcript of said original papers and the whole thereof.

Witness my hand and seal of said court, at Duluth, this 16th day of March, A. D. 1904.

[Seal of District Court, St. Louis Co., Minn.]

J. P. JOHNSON, Clerk,
By H. C. WEDMARK,
Deputy Clerk.

38 13879.

STATE OF MINNESOTA:

Supreme Court, April Term, A. D. 1904.

FRED A. GROSS, ALBERT F. GROSS, and LOUIS H. GROSS, Respondents,
vs.
GUSTAV E. HAFEMANN, Appellant. } No. 152. Syllabus.

Held, following Gross *et al. vs.* Hafemann, 97 N. W. 430, that the complaint herein states a cause of action.

Judgment affirmed.

39 13879.

STATE OF MINNESOTA:

Supreme Court, April Term, A. D. 1904.

FRED A. GROSS, ALBERT F. GROSS, and LOUIS H. GROSS, Respondents,
vs.
GUSTAV E. HAFEMANN, Appellant.
} No. 152. Opinion.

This is the second appeal in this action. Sec. 97 N. W. 430. The substance of the complaint herein is set forth in the opinion of this court on the former appeal to which reference is here made. That appeal was from an order overruling the defendant's demurrer to the complaint on the ground that it did not allege facts sufficient to constitute a cause of action. The order was affirmed by this court and on a remand of the cause to the district court the defendant answered admitting the allegations of the complaint except that he alleged that he sold the land for $7,500. and no more.

Thereupon the plaintiffs moved for judgment on the pleadings for one-fourth of the amount for which the land sold, that is for the sum of $1875. The motion was granted and final judgment entered in the district court for the plaintiffs and against the defendant for that sum. The defendant appealed to this court from the judgment. If the complaint alleges facts sufficient to constitute
40 a cause of action it is obvious that the judgment was correctly ordered and given, for the answer stated no defense. It is the contention of the defendant however that the complaint does not state a cause of action because the contract which is the basis of the action controvenes the terms of section 2262 of the Revised Statutes of the United States. This precise question was involved in the appeal from the order overruling the demurrer to the complaint and we held that the contract was a valid one. We adhere to that decision and affirm the judgment for the reasons stated in the opinion of the court on the former appeal.

Judgment affirmed.

START, C. J.

41 [Endorsed:] 13879 State of Minnesota, supreme court. Fred A. Gross *et al.* respondents *vs.* Gustav E. Hafemann appellant Copy of opinion and syllabus Filed June 17 1904 C. A. Pidgeon clerk. April term, A. D. 1904 Start C. J.

42 STATE OF MINNESOTA:

Supreme Court, April Term, A. D. 1904.

FRED A. GROSS, ALBERT F. GROSS, and LOUIS H. GROSS, Respondents, vs. GUSTAV E. HAFEMANN, Appellant. } No. 152.

Pursuant to an order of court duly made and entered in this cause, on the 28th day of June A. D. 1904,

It is here and hereby determined and adjudged that the judgment of the court below, herein appealed from, to wit, of the district court of the eleventh judicial district, sitting within and for the county of St. Louis be and the same hereby is in all things affirmed. And it is further determined and adjudged that the respondents above named, do have and recover of said Gustav E. Hafemann appellant herein the sum and amount of thirty-nine and 15-100 dollars ($39.15) costs and disbursements in this cause in this court, and that said respondents have execution for the enforcement thereof.

Dated and signed this 28th day of June A. D. 1904.

By the court.

[Seal of the Supreme Court, State of Minnesota.]

Attest:

C. A. PIDGEON, Clerk.

Statement for Judgment.

Costs allowed by statute	$25.00
Clerk's fees for making return	
Printer's fees	3.90
Clerk's fees, supreme court	10.00
Filing mandate	
Affidavits and acknowledgments	.25
Postage	
	$39.15

43 STATE OF MINNESOTA, Supreme Court, } ss:

I, C. A. Pidgeon, clerk of said supreme court, do hereby certify that the foregoing is a full and true copy of the entry of judgment in the cause therein entitled, as appears from the original remaining of record in my office; that I have carefully compared the within copy with said original, and that the same is a correct transcript therefrom.

Witness my hand and the seal of said supreme court at the capitol in the city of St. Paul, this 28th day of June A. D. 1904.

C. A. PIDGEON, Clerk.

[Endorsed:] 13879. State of Minnesota, supreme court. Transcript of judgment. Filed June 28 A. D. 1904. C. A. Pidgeon, clerk.

44 STATE OF MINNESOTA:

Supreme Court, April Term, A. D. 1904.

FRED A. GROSS, ALBERT F. GROSS, and LOUIS H. GROSS, Respondents, vs. GUSTAV E. HAFEMANN, Appellant. } No. 162.

Appeal from District Court, Eleventh Judicial District, County of St. Louis.

This cause having been duly argued and submitted at the general April term of this court, A. D. 1904 upon the return to the appeal herein.

Now after full and mature deliberation had thereon, it is here and hereby ordered that the judgment of the court below, herein appealed from, be and the same hereby is, in all things affirmed and that the respondents above named have judgment accordingly.

Entered June 28th, A. D. 1904.

By the court.

[Seal of the Supreme Court, State of Minnesota.]

Attest: C. A. PIDGEON, Clerk.

I hereby certify that the foregoing is a full and true copy of the original order for judgement entered in the above entitled cause.

Attest:

C. A. PIGDEON, Clerk.

45 [Endorsed:] No. 13879. State of Minnesota, supreme court. Copy of order for judgment. Filed June 28 A. D. 1904. C. A. Pidgeon, clerk.

46 STATE OF MINNESOTA:

Supreme Court, General April Term, A. D. 1904.

FRIDAY MORNING, 9:30 o'clock, June 10th, A. D. 1905.

Court convened pursuant to adjournment. All the justices being present.

FRED A. GROSS, ALBERT F. GROSS, and Louisa H. Gross, Respondents, vs. GUSTAV E. HAFEMANN, Appellant. } Cal. No. 152, Reg. No. 13879.

This cause came on to be heard this day upon the return to the appeal herein.

Thereupon the same was submitted to the court for decision, upon paper books and briefs of counsel and taken under advisement.

A true record.

[Seal of the Supreme Court, State of Minnesota.]

Attest: C. A. PIDGEON, Clerk.

The foregoing is a full and true copy of the minutes of argument in the above entitled cause.

Attest: C. A. PIDGEON, Clerk.

47 [Endorsed:] 13879 State of Minnesota supreme court. Copy of minutes of argument. Filed June 28 A. D. 1904 C. A. Pidgeon clerk.

48 [Endorsed:] No. 13879 State of Minnesota supreme court. Fred A. Gross, Albert F. Gross and Louisa H. Gross respondents against Gustav E. Hafemann appellant Judgment roll. Filed July 12, 1904 C. A. Pidgeon clerk.

49 STATE OF MINNESOTA:

Supreme Court.

STATE OF MINNESOTA, Office of Clerk of Supreme Court, } ss:

I, C. A. Pidgeon, clerk of the supreme court of the State of Minnesota, do hereby certify and return to the Supreme Court of the United States, that the foregoing and annexed transcript of record is a full and complete transcript of the record, judgment, judgment roll and all of the proceedings had in the said supreme court of the State of Minnesota in the case between Gustav E. Hafemann, appellant and plaintiff in error, and Fred A. Gross, Albert F. Gross and

Louis H. Gross, respondents and defendants in error, including the opinion of the said supreme court therein, as appears from the original files and records of said supreme court of the State of Minnesota.

And I do further certify and return that I have annexed to said transcript and included therewith a copy of the petition for writ of error and of the bond on the writ of error and approval thereof, and the assignments of error as the same remain on file and of record in said supreme court of the State of Minnesota, and the original writ of error from the Supreme Court of the United States and the original citation issued thereon, with admission of service thereof, and that the foregoing constitutes a true and complete return to said writ of error.

In witness whereof, I have hereunto set my hand and the seal of said supreme court of the State of Minnesota at the capitol, at St. Paul, Minnesota, this 13th day of July, A. D. 1904.

[Seal of the Supreme Court, State of Minnesota.]

C. A. PIDGEON,
Clerk of the Supreme Court of the State of Minnesota.

[Endorsed:] State of Minnesota, supreme court. Gustaf E. Hafemann, plaintiff in error, *vs.* Fred A. Gross *et al.*, defendants in error. Return.

Endorsed on cover: File No. 19,422. Minnesota supreme court. Term No. 64. Gustav E. Hafemann, plaintiff in error, *vs.* Fred A. Gross, Albert F. Gross, and Louis H. Gross. Filed July 25th, 1904. File No. 19,422.

Supreme Court of the United States,

OCTOBER TERM, 1905.

No. 64.

GUSTAV E. HAFEMAN,

Plaintiff in Error.

vs.

FRED A. GROSS, ALBERT F. GROSS and LOUIS H. GROSS.

Brief for Plaintiff in Error.

STATEMENT.

Defendants in error brought this action in the District Court for St. Louis County, Minnesota, against the plaintiff in error to recover a money judgment, basing their cause of action on the following written agreement, to-wit:

"THIS AGREEMENT, made and entered into this 1st day of December, 1890, by and between Fred A. Gross, Albert F. Gross, Louis H. Gross and Edmund F. Gross, parties of the first part, and Gustav E. Hafeman, party of the second part, all of Duluth, Minnesota,

WITNESSETH, that for and in consideration of the covenants hereinafter mentioned, the parties of the first part agree to pay one-fourth of all expenses accruing to the party of the second part in making final proof to SW¼ of the NW¼, the N½ of the SW¼ and the SW¼ of the SW¼ of Sec. 14, all in Township 58, North of Range 19 West in St. Louis County, Minn., and receiving title thereto, and the party of the second part agrees and binds himself to pay t othe parties of the first part One Hundred Dollars in cash upon the delivery of these

presents for locating him on said land, and he further agrees to give the parties of the first part one-fourth part of the price and proceeds that may hereafter be obtained for the sale of said land after he has obtained title thereto from the United States, deducting the one-fourth expense as above provided, and can find a purchaser for and sell the same at its proper value.

IN WITNESS WHEREOF, the parties hereto have signed their names to this contract the day and year above written.

ALBERT F. GROSS & BROS.
GUSTAV E. HAFEMAN."

(See page 10 of Transcript.)

In addition to setting out the contract in full and accounting for the absence of Edmund F. Gross as one of the plaintiffs, the complaint alleges the acquisition of the title and the sale of the lands described in the complaint, by Hafeman, for a stated sum, and asks judgment for one-fourth of that sum with interest from date of sale (see pp. 8, 9, 10, Transcript.)

The complaint was at first demurred to and upon the demurrer being overruled, (see Gross vs Hafemann, 91 Minn, 1,) the plaintiff in error answered; the answer admitting the contract, and to clear up an obscurity in the complaint alleged: "that the defendant (plaintiff in error) filed a declaratory statement of his intention to purchase said land on the 16th day of October, 1890, but did not make entry upon nor final proof on, nor payment for said lands until the 29th day of August, A. D. 1891." It will be observed that the contract was executed December 1st, 1890.

A further allegation in the answer was: "Defendant alleges that at the time the contract set out in plaintiff's complaint as 'Exhibit A' was entered into, to-wit, on the 1st day of December, A. D. 1890, the lands described in said contract, being the same lands described in the complaint herein, were public lands and belonged to the United States Government and that defendant at said time had acquired nothing more than a preferential right to purchase said lands from the General Gov-

ernment, under the pre-emption laws of the United States; that said contract was entered into in contemplation of the defendant's thereafter acquiring title to the lands therein described, from the General Government of the United States under the provisions of the pre-emption law; and therefore and for that reason, this defendant alleges further, upon information and belief, that the said contract was and is against public policy and void, and was and is in contravention of the terms of the pre-emption laws of the United States." See pp. 11, 12 Transcript.)

Under this state of the pleadings, the trial court awarded judgment on the pleadings in favor of the plaintiffs (defendant in error) for one-fourth of the amount which the answer admitted the lands described in the agreement had been sold for, with interest from the admitted date of sale. (See p 14 Transcript.) Judgment was entered pursuant to such order. (See p. 15, Transcript.)

Thereupon plaintiff in error appealed to the Supreme Court of the State of Minnesota from said judgment and that court made an order affirming the decision of the lower court. (See p. 19, Transcript.) The case is in this court on writ of error to the Supreme Court of Minnesota, bringing up this affirmance and judgment for review.

The decision herein must turn upon the construction of the contract heretofore set out and upon whether it contravenes the terms of Section 2262 of the Revised Statutes of the United States, which in part pertinent reads as follows:

"Before any person claiming the benefit of this chapter is allowed to enter lands, he shall make oath before the Receiver or Register of the land district in which the land is siuated.... .....That he has not settled upon and improved such land to sell the same on speculation, but in good faith to appropriate it to his own exclusive use; and that he has not, directly or indirectly, made any agree-

ment or contract in any way or manner, with any person whatsoever, by which the title which he might acquire from the Government of the United States should inure in whole or in part to the benefit of any person except himself;....."

SPECIFICATIONS OF ERROR.

The trial court erred in ordering judgment on the pleadings and the Supreme Court of the State of Minnesota erred in sustaining the judgment entered pursuant to such order.

BRIEF FOR PLAINTIFF IN ERROR.

I.

This case presents a federal question and the contract on which the action is brought directly contravenes the terms of 2262, *Supra.*

The determination of the court below turned upon what, it is submitted, was an erroneous intrepretation of the word "title" occurring in Section 2262. The learned court missed the substance in its pursuit of a shadow.

"Title" is defined as the means whereby the owner of lands has the just possession of his property 2 Bl. Comm. 195, but Blackstone is there treating the subject of *tenures.* But "title" has also respect to that which is the subject of ownership.

Springfield F. & M. Co., vs Allen, 43 *N. Y.* 389-385.

The word "title" as used in Section 2262 relates to the affiant's prospective ownership of the *land* about to be entered, and the statute, by the use of the word "title", in dicates an intention to guard against a transfer or an agreement to transfer to any one whatever, the land, that is a beneficial interest in the land, which the entry man is taking steps to acquire from the Government. The language is industriously framed to

cover all conceivable evasions. "Title", as applied to lands, signifies either a party's right to the enjoyment thereof or the means whereby such right is approved or by which it is evidenced.

Proatt vs Fountain, 73 Ga. 261, quoting Abbott's Law Dictionary.

"The right to the enjoyment" to the extent of one fourth, vested by the terms of this contract in Gross Brothers. The equitable title, the whole beneficial interest in one fourth of this land, everything but the naked legal title, was vested, by the terms of the contract, in Gross Brothers, burdened only with the right in and engagement by Hafemann to sell the land and pay the proceeds over to Gross Brothers. Hafeman could and must sell the entire tract including Gross Brothers' interest, but he could do so only by virtue of the power given him in the contract. Hafemann could not mortgage this Gross Brothers' interest in the land; that power not being given him in the contract. Hafemann did not have absolute dominion over the land. His dominion was qualified by the contract. "It is a principal of law well recognized in the administration of justice that one may have an equitable title in the land, that is, the legal title may be vested in one person and the beneficial interest in the land may inure to another person, who may be named in the deed or who may not be named at all, whose right may exist by parol, that is, by the word of mouth, not shown by any written evidence." Beringer vs. Lutz, 188 Pa., 364-5.

The same situation, in legal contemplation, is made to appear in the case at bar by the written contract as was shown to exist wholly by parol in the case of *Woolford vs Farnham,* 44 *Minn.* 159-162, in which case it was held that the party holding a similar beneficial interest to the one discussed here, was the owner and holder of the equitable title to the land. See also *Randall vs Constans* 33 *Minn.* 329.

Would the title which Hafeman might secure from the government "inure", under the terms of this contract, "in whole or in part to the benefit" of the defendants in error? Manifestly yes, "in part". The title, having respect by the word "title" to that which is or may be the subject of ownership, that is, the beneficial interest in the land about to be entered, could "inure" to the benefit of Gross Brothers, without their holding the legal title. The contract is wholly different from a contract where the entryman agrees, on acquiring title, to pay the locator a sum of money equal to one fourth or some other part of the value of the land acquired, such as are the cases relied on by the Supreme Court of Minnesota and decided by the Department of the Interior. Such a contract gives no interest in the land, beneficial or otherwise. In such case the only purpose the land acquired serves in the contract is as a yard stick to measure the party's amount of compensation for locating the other party upon the land, and for aught that there is in such a contract the owner might sell the land or mortgage it or otherwise encumber it; he is left with complete dominion over the land. But not so under this contract. To be sure, Hafemann could sell outright under this contract; he could do so, however, because and only because the contract so provided. The contract created and conferred upon Hafemann, by its terms, a power of sale, and Hafemann also engaged to sell on finding a purchaser.

Suppose the land had borne a valuable growth of timber, at the time of acquisition of title by Hafemann, and thereafter and before sale, a devastating fire had swept over the land and denuded it; Would such a casualty "inure" to the defendant in error's loss? Manifestly yes.

Suppose after the acquisition of title by Hafemann and before sale a valuable mine should have been discovered in the land; would such discovery have "inured" to the defendants in

error's gain? Manifestly yes. The defendants in error's interest increases and decreases with the rise and fall of the value of the land, so long as the land remains unsold.

Again: Suppose that Hafemann, as soon as he acquired title to the land, had proceeded to mortgage the entire tract to a third party. Is it not clear that such act would have been a violaion of his contract and equally clear that, if notice of the contract should have been brought home to the prospective mortgagee, the mortgage would not have been a lien on more than three fourths of the land?

This contract contains the evils, in full flower, described by the court in the case of *Myers vs Croft,* 13 *Wall.,* 291-296, as being the evils, which it was the design and purpose of the pre-emption law to cut out. If this contract is valid, defendants in error were the owners of one fourth of the identical proceeds realized from the admitted sale of the land and were entitled to such one fourth immediately on their receipt by Hafemann and if defendants in error could have found and have put their hands on the money actually received they could have proceeded under title 8 of Chapter 66 G. S. Minn., 1894, and have claimed immediate delivery of the money, a thing which could never be done in an action for debt merely.

It has been held in the case of *Anderson vs Carkins* 135 U. S. 483, reversing Carkins vs Anderson 21 Neb. 364, that a contract whereby one about to enter a homestead agreed to convey it to another was against public policy and void and not enforceable in equity. This decision was based on the construction of Secs. 2290-2291 R. S. U. S., relating to homestead entries, but the provisions of the pre-emption statute above quoted are even more stringent than those of Secs. 2290-2291. See the opinion written by Justice Brewer in *Mellison vs Allen,* 30 Kan. 384.

The contract relied on by the defendants in error, if otherwise valid, would under the law of the State of Minnesota, and under the common law, give them an equitable interest in the land. The contract was drawn with the manifest purpose of evading the terms of Section 2262, but it clearly provides that the plaintiff in error, on acquiring title, shall hold one fourth of the land in trust for the defendants in error until such time as a purchaser for the land could be found at its fair value and that when, and as soon as, such a purchaser is found, the plaintiff in error would sell and convey the same and pay the proceeds over to the defendants in error. Under this agreement there was nothing left in Hafemann but the legal title; the entire beneficial interest, the equitable title, passed to the defendants in error. (See *Woolford vs. Farnham* and *Randall vs Constans, Supra.*)

The parties according to the terms of this contract engaged in a joint undertaking, which was that Gross Brothers should furnish Hafemann with the minutes and locate him on certain Government lands subject to pre-emption, and would also bear one fourth of the expense attendant upon Hafemann's making title to said lands under the pre-emption law, and Hafemann, on the other hand, in consideration, and *solely* in consideration, of Gross Brothers doing the things just enumerated, undertook and agreed to pay Gross Brothers One Hundred Dollars and to acquire title to the land under the pre-emption law (which all the parties are to be considered as knowing involved the making the affidavit required by Section 2262), and to hold the title to one fourth of the same in trust for Gross Brothers until such time as he could find a purchaser therefor at a fair value and, when found, undertook and engaged to sell the land and to pay one fourth the proceeds of such sale over to Gross Brothers as their share of the fruits of the enterprise. The contract does not formally set out that Hafemann is to hold the title in trust

for Gross Brothers; The contract is a very informal document, but such must be its meaning or else it is meaningless.

There is no feature of debt in this transaction.

A contract by a settler upon public lands of the United States made before the pre-emption of it to convey to another an interest in the land in consideration for money loaned or advanced him to pre-empt it, is in violation of the statute (sec. 2262) and void. It amounts to a contract in which one party undertakes to bribe and the other agrees to commit perjury.

There is no remedy in law or equity on such contracts.

Marshall vs Cowles, 48 Ark. 362.

There is no difference in reason or in law between contracting to convey the land and contracting to hold the land until sold and on sale to pay the proceeds to the contractee, so far as the application of section 2262 is concerned; both contracts are directly in the teeth of that statute.

The defendant, a pre-emptor under the act of congress of Sept. 4th, 1841, who had not entered and paid for the land occupied by him, agreed to convey part of it to plaintiff. Afterwards, for the purpose of enabling him to make the oath required by the act of congress to secure the pre-emption right, he induced plaintiff to surrender the evidence of the agreement, he promising orally that after his entry he would renew it. The plaintiff had paid him $150 on the original agreement. Held, that the agreement was against public policy and void, and no action can be maintained to recover damages for its non-performance or to recover back the money paid on it.

St. Peter Co. vs Bunker, 5 *Minn.* 153.

Money paid upon a contract with a pre-emptor to sell his pre-emption claim before his entry and payment, cannot be recovered.

Bruggermann vs Hoerr, 7 *Minn.* 62.

The advance of money to a pre-emptor, to pre-empt land, on an agreement that in consideration thereof he will convey part of the land pre-empted to the party advancing the money, furnishes no legal cause of action.

Ferguson vs Kumber, 11 *Minn.* 62.

A contract by pre-emptor about to pre-empt land, b ywhich he agress to give another an interest in the land is utterly void and incapable of becoming the foundation for any rights.

Evans vs Folsom, 5 *Minn.* 342.

The earlier decisions in this state held that a mortgage of pre-empted lands executed by the pre-emptor after making his proofs, but before patent issued, pursuant to an agreement made before the proofs, is void.

McCue vs Smith, 9 *Minn.* 237.

Woodbury vs Dorman, 15 *Minn.* 272.

A later decision in this state is *Jones vs Tainter*, 15 *Minn.* 423, in which it was held: That a mortgage by a pre-emptor upon the land pre-empted, executed after the proofs were made, pursuant to an agreement made before the proofs, to secure the price of the land warrant used in paying for the land, is valid. This decision was by a court different in its personnel from the court which decided the previously cited mortgage cases, and the court places its decision on the ground that the agreement was not one by which the title to be acquired should inure to the benefit of any one other than the entry man. In other words, that a mortgage was not an interest in the real estate. Whatever may be thought of this decision it can be readily seen that the court's language or reasoning would not be applicable to this agreement.

II.

The agreement sued on here contravenes the federal statute in still another equally patent feature. The entry man must mak oath "that he has not settled upon and improved such land to sell the same on speculation," and by the terms of the contract with the plaintiffs, he had expressly undertaken and agreed to do that identical thing. Quoting from the contract: "and he further agrees to give the parties of the first part one fourth part of the price and proceeds that may hereafter be obtained for the sale of said lands after he has obtained title thereto from the United States, deducting the one fourth expenses as above provided and can find a purchaser for and sell the same as its proper value." To deal in land "on speculation", the phrase of the statute, is to buy land in the expectation of selling again at an advanced price, the very thing contemplated by this agreement.

The relative culpability of the parties to this action is not shown by this record and it may not be amiss to suggest this possible situation: These locators, Gross Brothers, may have made a business, of finding prospective entry men, ignorant of the land laws and relying upon Gross Brothers for their instructions, and of making these contracts for such entry men, drawing them in such a way as to induce the belief on the part of the entry men that there was nothing inconsistent between such contracts and the entryman's oath.

It is submitted that the judgment should be reversed.

Roger D. Powell

Attorney for Plaintiff in error.

SUPREME COURT

OF THE

UNITED STATES.

OCTOBER TERM, A. D. 1905.

No. 64.

GUSTAV E. HAFEMANN,

Plaintiff in Error,

vs.

FRED A. GROSS, ALBERT F. GROSS and LOUIS H. GROSS,

Defendants in Error.

BRIEF FOR DEFENDANTS IN ERROR.

STATEMENT OF CASE.

In the year 1890, along with one Edmund F. Gross, the defendants in error were engaged in the occupation of locating people upon lands of the United States, subject to entry and settlement under the laws of the United States.

In the latter part of September or the forepart of October, 1890, at the request of the plaintiff in error, with the said Edmund F. Gross, the defendants in error rendered valuable assistance to the plaintiff in error in making settlement upon the lands described in the complaint in this action. Transcript of Record, printed page 9, original page 20.

On the 11th day of October, 1890, the plaintiff in error, by and with the assistance of the defendants in error and the said Edmund F. Gross, filed with the Register of the proper United States land District, his statement, declaring his intention to claim said land under the pre-emption laws, as required by Section No. 2264 of the Revised Statutes of the United States.

On the first day of December, 1890, the contract, Exhibit "A". Transcript of Record, printed page 10, original pages 23 and 24, the violation and breach of which is the basis of this action, was entered into, and on the 29th day of August, 1891, the plaintiff in error made his final proof and entry of said lands and is admitted then to have made the affidavit required by Section No. 2262 of the Revised Statutes of the United States, and thereby acquired title to said land.

On or about the 17th day of July, 1902, the plaintiff in error sold the land in question, as alleged in the complaint in this action, Transcript of Record, printed pages 9 and 10 and original pages 21 and 22, for the sum of $22,500.00 and this action was brought originally in the District Court of St. Louis County and State of Minnesota, to recover one-fourth of said alleged amount, or $5,625.00, being the alleged amount due defendants in error by the terms of said contract.

The plaintiff in error demurred to the complaint in the action for the alleged reason that it did not state facts sufficient to constitute a cause of action. The demurrer was overruled by the said District Court and from the order overruling the demurrer the plaintiff in error appealed to the Supreme Court of the State of Minnesota. The Supreme Court sustained the order overruling the demurrer and remanded the case for further disposition by the lower Court.

Gross et. al. vs. Hafeman, 91, Minn.,
Page 1.

The plaintiff in error then interposed an answer to the complaint in the action, Transcript of Record, printed pages 11 and 12 and original pages 24, 25 and 26, in which he admitted all of the allegations of the complaint, save the fact that the plaintiff in error received for the land the sum of $22,500.00 and alleged the fact to be that he received but $7,500.00 therefor.

The case was then noted for trial at the January, General Term, 1904, of the District Court of the 11th Judicial District, St. Louis County, Minnesota. On the first day of said term, on January 6th, 1904, at the close of the call of the calendar, all of the parties being present in court, the defendants in error moved for judgment on the pleadings. Transcript of Record, printed pages 13 and 14 and original pages 28 and 29.

Pursuant to said motion, on the 8th day of January, 1904, the Court ordered judgment against the plaintiff in error for the sum of $1875.00, being one fourth of $7,500.00, with interest thereon at the rate of six per cent per annum from July 17th,

1902, together with the costs and disbursements of the action. Transcript of Record, printed page 14 and original pages 29 and 30. In accordance with said order, on the 12th day of January, 1904, judgment was entered in favor of the defendants in error and against the plaintiff in error for the sum of $2,057.90. Transcript of Record, printed page 15 and original pages 30 and 31.

The plaintiff in error then appealed from the judgment so entered to the Supreme Court of the State of Minnesota, and asked for a reversal of the judgment on the ground that the contract sued upon was illegal and non-enforceable, being in violation and contravention of Section No. 2262 of the Revised Statutes of the United States. This appeal was heard at the April Term of the Supreme Court, A. D. 1904. The Supreme Court affirmed the judgment rendered in the lower court. Transcript, printed page 19 and original pages 39 and 40 and 92, Minn. Rp., pages 367 and 368. The plaintiff in error then removed the cause to this court upon writ of error.

ARGUMENT.

The plaintiff in error in suing out his writ gives three assignments of error. Transcript of Record, printed page 7 and original page 15. In the consideration of the case it is necessary to deal with but one of these assignments, namely, the 3rd, which is as follows:

> "The Court erred in holding that the contract set out in the complaint of the plaintiffs below, was valid and enforceable and was not in conflict with the provisions and requirements of Section No. 2262 of the Revised Statutes of the United States."

In the trial of this case in the lower and higher Courts of the State, but one question has been presented for the consideration of the Courts and that is;

> Does the contract, Exhibit "A", Transcript of Record, printed page 10 and original page 23, in any way contravene the requirements and provisions of Section No. 2262, *supra?*

In deciding this case when it was first brought before it the Supreme Court of the State of Minnesota says:

> "On appeal the single question presented is whether or not this agreement contravenes the terms of Section 2262 of the Revised Statutes of the United States?"
>
> Gross et. al. vs. Hafemann, 91 Minn., page 1.

In the opinion deciding the case when it was before the same court the second time and from which decision this writ of error is taken, the Court says:

> "If the complaint alleges facts sufficient to constitute a cause of action it is obvious that the judgment was correctly ordered and given, for the answer stated no defense. It is the contention of the defendant, however, that the complaint does not state a cause of action because the contract which is the basis of the action contravenes the terms of section 2262 of the Revised Statutes of the United States. This precise question was involved in the appeal from the order overruling the demurrer to the complaint and we held that the contract was a valid one."

Gross et. al. vs. Hafemann, 92 Minn., page 367.

This being the case the only question that will be considered by this Court in the determination of the case at bar will be whether or not the agreement, Exhibit "A", *supra*, contravenes the provisions, terms and conditions of section 2262 of the Revised Statutes of the United States.

This court will not consider any phase of the case that was not raised by the parties in the trial and determination of the case in the state courts.

McMillen vs. Ferrum Mining Co. 197 U. S. Rep., 343.

I.

DOES THE CONTRACT, EXHIBIT "A", SUPRA, CONTRAVENE THE STATUTE ABOVE CITED ?

That part of section 2262, Revised Statues of the United States which is pertinent to this case reads as follows:

> "Before any person claiming the benefit of this chapter is allowed to enter lands he shall make oath before the receiver or register of the land district in which the land is situated * * * * that he has not settled upon and improved such land to sell the same on speculation, but in good faith to appropriate it to his own exclusive use; and that he has not, directly or indirectly, made any agreement or contract, in any way or manner, with any person whatsoever, by which the

> title which he might acquire from the government of the United States should inure in whole or in part to the benefit of any person except himself * * * * * *"

Reduced to its simplicity the contract involved, provides that the plaintiff in error is to pay the defendants in error for rendering him services in locating upon and acquiring the land in question the sum of $100 and a sum equal to one fourth of the net amount which he should receive for the land when he sold it. A contract to pay so much for services rendered and to be rendered and nothing more.

It is the *title* to the land which the statute in question prohibits the entry-man or the prospective purchaser from in any way encumbering by prior agreement.

The cases that have been considered and determined by the Courts bearing on the construction of the statute in question and the analogous provisions contained in the homestead, timber culture and stone and timber Acts, are those where the parties seeking to acquire title to the lands of the United States under these acts have made agreements to convey the *title* or some interest therein after the same has been obtained from the Government.

If the contract under consideration were one wherein the plaintiff in error agreed to convey an interest in the title to the land involved, the defendants in error would have no interest in the case at bar. The law upon that point is too well settled to admit of discussion.

The case of Anderson vs. Carkins, 135 U. S. Rep., 483, was brought by Carkins for the purpose of enforcing the specific performance of an agreement made before the filing of a homestead by Anderson to convey one half of the land so homesteaded to Carkins upon Anderson acquiring title thereto. The Court held that the agreement contravened the provisions of sections 2290 and 2291 of the Revised Statutes of the United States and hence against public policy and should not be enforced.

In the case of Mellison vs. Allen, 30 Kansas, 382, Mellison was occupying land with the intention of obtaining title to the same under the homestead laws of the United States and while so holding the land he contracts with Allen to prove up on the same within a year and convey one half of it to Allen. Court says equity will not enforce the agreement because it would be against public policy to do so.

In Marshall vs. Cowles, 48 Ark., 362, Marshall entered and purchased a piece of land under the pre-emption laws of the United States. Prior to his purchasing the land he entered into an agreement with Cowles, whereby Cowles was to furnish half the money required to purchase the land from the United State and when the title was finally obtained for the land, Marshall was to convey one half of the land to Cowles. Action was brought to enforce specific performance of the agreement. The Court refused to grant relief because it was an agreement to convey an interest in the *title* to the land and in violation of section 2262, *supra*.

The Supreme Sourt of the State of Minnesota has repeatedly held that any agreement made prior

to the entry or the purchase of land under the pre-emption act, by the entryman to convey the title or any portion thereof, to the land so acquired, is null and void and against public policy.

St. Peter Co. vs. Bunker, 5 Minn., 153.
Bruggerman vs. Hoerr, 7 Minn., 62.
Ferguson vs. Kumler, 11 Minn., 62.
Evans vs. Folsom, 5 Minn., 342.

In its earlier decisions the same court held that a mortgage given on land by a pre-emptor, acquired under the pre-emption laws of the United States, pursuant to an agreement made prior to the acquiring of the title to the land was invalid and not enforceable, being in contravention of section 2262, *supra*.

McCue vs. Smith, 9 Minn., 237.
Woodbury vs. Dorman, 15 Minn., 272.

We have cited and commented upon these last nine cases, principally for two reasons, namely,

1st. To show that it was the question of the *title* and it only that was involved in all of the contracts considered and passed upon in all of these cases, and

2nd. Because the plaintiff in error has cited and relied upon all of these cases in his brief and argument of this case in all of the courts.

Later the Minnesota Court reversed the position taken in the two last cited cases and in the case so reversing its former holdings it expresses itself as follows:

"The question is, was there any *contract* or *agreement* by which the pre-emptor fixed this result. Did the pre-emptor *contract* or *agree* that the title to be acquired, that is to say the *fee, should inure* to the benefit of another. In other words, did the pre-emptor contract or agree to do anything, which when done, would *pass* the *title*, in whole or in part, to another, so that the pre-emptor would, as to such whole or part, be a mere *conduit* of the title?"

Jones vs. Tainter, 15 Minn., 234. Body of Opinion 426.

According to this holding, and we believe that this is expressive of nearly all the courts that have passed upon this question, if plaintiff in error had agreed to give a mortgage upon the land in question to the defendants in error, instead of such an agreement as he did make and at the time the agreement under consideration in this case was given, to secure the agreed value of their services, and such mortgage in compliance with such contract had been made it would be valid and enforceable. Is it possible that an unsecured claim which in no way is a lien upon the title of a pre-emptor is in contravention of section 2262, *supra*, while an agreement to give a mortgage under precisely the same circumstances is valid? We think not.

The agreement between the plaintiff in error and the defendants in error in no way affected the title to the land. It in no way affected the supervision of the plaintiff in error over the land. It gave no voice to the defendants in error in the matter of the disposition of the land. It gave no lien to the defendants in error upon the title to

the land. The defendants in error did not and were not to advance by the terms of the agreement any money to the plaintiff in error. By the terms of the agreement the plaintiff in error was to pay the defendants in error a sum equal to one-fourth of the net proceeds of what he should receive for the land when he sold it and $100.00. There is no time fixed when the plaintiff in error should sell the land. He was in no way to confer with the defendants in error as to when he should dispose of the land or for what price she should sell it. *In other words, the agreement in no way whatsoever gives, by any possible construction, any interest in the title or lien of any nature thereon or therein to the defendants in error.*

In the case of the United States vs. Budd, 144 U. S. Rep., 154, Justice Brewer writing the opinion, in construing section No. 2, of the Act of June 3, 1878, U. S. Compiled Statutes, 1901, page 1545, Revised Statutes of the United States, being a part of Timber and Stone Act, and which is analogous to and almost word for word the same as section No. 2262, *supra*, says:

> "The act does not in any respect limit the dominion which the purchaser has over the land after its purchase from the government or restrict in the slightest his power of alienation. All that it denounces is a prior agreement, the acting for another in the purchase. If, when the title passes from the government, no one save the purchaser has any claim upon it, the Act is satisfied."

This opinion is cited with approval in the case of *United States vs. Mackintosh*, 85 *Fed. Rep.*, 333. *Opinion*, 338.

In the case of Anderson vs. Carkins, *supra.*, it became necessary for this court to construe certain statutes of the state of Nebraska, with relation to their bearing upon that part of the homestead act which is analogous to the section of the pre-emption act under consideration in this case. The Statutes of Nebraska referred to read as follows:

> "All contracts, promises, assumpsits, or undertakings, either written or verbal, which shall be made hereafter in good faith and without fraud, collusion or circumvention, for sale or purchase or payment of improvements made on the lands owned by the Government of the United Sates shall be valid in law or equity, and may be sued for and recovered, as in other contracts."
>
> "All deeds of quit claim or other conveyance of all improvements made upon public lands, shall be as binding and as effectual in law and equity between the parties for the conveying of the title of the grantors in and to the same, as in case when the grantor has the fee simple to the premises."

The court in rendering its decision and passing upon the force of these statutes as bearing upon that part of the homestead act above referred to, Justice Brewer writing the opinion, says:

> "The law of Congress is paramount; it cannot be nullified by direct act of any state, nor the scope and effect of its provisions set at naught indirectly. But we do not think that the sections of the Nebraska Statutes cited, were intended to nullify the provisions of the Acts of Congress, or have any such effect. But these refer simply to contracts for the sale and conveyance of improvements upon public

lands. They are in terms limited to the matter of improvements, and do not touch in any way the land itself, whether in respect to conveyance or contract to convey."

The statutes of a state are no more sacred than a contract between individuals. The statutes will be enforced when they do not contravene the fundamental law of the land or some paramount statutory law. Contracts will be enforced when they do not violate the statutory laws of the state or nation or the common law of the land.

The homestead act, the pre-emption act and the tree culture act all contemplate that, before title to land taken up under either of them can be acquired, certain improvements must be placed on such land and that such improvements are to become a fixture to and run with the land. Still we find the courts declaring statutes valid which say that such improvements may be sold or aliened or that any contracts, promises or any undertaking made in contemplation of the selling or the mortgaging of such improvements are valid and enforceable. Perforce then, must not the contract calling for construction in the case at bar be declared valid and enforceable, when it in no way affects the title to the land or agrees or contracts to give any beneficial interest in the same or the improvements which may be placed thereon by the pre-emptor, or in any way, manner or form attempts to hamper the pre-emptor in the disposition of the same, but is simply a measure of the amount of money which he shall pay the person rendering him assistance in pointing out the land in the first instance, assisting him in filing upon the land and in putting improvements thereon and finally as-

sisting him in the work and routine of obtaining patent to the land? It certainly must.

It will not be amiss to inquire what has been the position taken by the Department of the Interior in construing contracts of a similar nature to the one in the case at bar.

In the case of Kingston vs. Eckman, 22 L. D., 234, the Secretary in construing that part of section 2, of the Act of June 3rd, 1878, which is analogous to that part of section 2262, *supra*, and affecting a contract where the applicant for the land, before making his entry and application for the same, had agreed with certain persons who located him on the land to pay them for said services one-fourth of the value of the stumpage on the land when the stumpage should be sold, says:

> "The only agreement or contract forbidden by the Statutes is one by which the title may inure in whole or in part to the benefit of any person, except the applicant, himself. If the agreement or contract is not of this nature, it cannot be in violation of the statute. The statute itself makes a specific designation of the kind of agreement or contract that is forbidden. It will be observed from its language that the agreement or contract which may inure to the benefit of some other person than the applicant, must affect in whole or in part the title to the land."

The Department voiced the same idea in its opinion in the case of Dawson et. al. vs. Higgins, 22 L. D., page 544, in construing that section of the homestead act, analogous to section 2262, *supra*.

Both these decisions are of comparative recent date, having been rendered in 1896, and reflect the exact position of the Department upon

the question paramount in the case at bar. It must be an agreement affecting the entryman's interest in the title to the land in order to defeat the contract.

II.

THE CONTRACT, EXHIBIT "A", SUPRA, DID NOT CREATE PLAINTIFF IN ERROR A TRUSTEE TO HOLD ONE FOURTH OF THE TITLE OF THE LAND FOR THE BENEFIT AND USE OF THE DEFENDANTS IN ERROR.

A title is the evidence that a person possesses, which gives him the right to take possession of, and enjoy the use and benefit of property. It is no myth. It is a tangible reality. It is the substance of the thing sought as well as the thing itself. The man who owns the title to the property owns the property.

The plaintiff in error would show that the contract under consideration here, is evidence of an agreement between the parties to this action, whereby the plaintiff in error is to hold the title for the use and benefit of the defendants in error. That all rents and profits of whatsoever nature arising from and out of one fourth of said land belonged to the defendants in error. That the plaintiff in error was created by said contract a trustee to hold for the defendants in error one fourth of said land.

In support of the proposition he cites the following cases, namely:

Springfield F. & M. Ins. Co. vs. Allen, 43 N. Y., 385-389.
Pratt vs. Fountain, 73 Ga., 261.
Beringer vs. Lutz, 188 Pa., 364.
Wolford vs. Farnham, 44 Minn., 159.
Randall vs. Constans, 33 Minn., 329.

The first two cases he cites to show what is meant by title. As to the meaning of the word there can be no question, but the proposition that the contract under consideration is evidence which bears out the meaning of the word is not capable of demonstration. The cases cited by the plaintiff in error are a misapplication. The case of Beringer vs. Lutz, is cited in support of the well known and long recognized legal proposition, that the legal title may be vested in one person while the real or equitable may belong to another.

The plaintiff in error tells us that the contract in the case at bar, vests one-fourth of the naked legal title in one person while the equitable or beneficial title is vested in another and in support of this contention cites the cases of Wolford vs. Farnham and Randall vs. Constans, *supra*.

Let us examine those cases and see if the agreements involved in those cases were the same as the agreement in the case at bar.

In the case of Wolford vs. Farnham, the court, on page 161, finds the agreement between Sumner W. Farnham and Eunice E. Farnham to be as follows:

> "In June, 1878, Eunice E. Farnham was the owner of an undivided one third of certain real estate on Hennepin Island, Minneap-

olis. and it was then orally agreed between Sumner W. and her that she should convey the one third to him, and that he should hold her interest in it for her until it should be sold, and that upon the sale of it the purchase price should be paid to and belong to her."

The court holds that Sumner W. is a trustee and holds the land for Eunice E. That Eunice E. is the owner of the land and should have the benefits, profit and rents thereof. But note what the agreement says: "He should hold her interest in it *for her* and that upon the sale of it the purchase price should be paid to and *belong to her.*"

Is there any such word or any words conveying such a meaning in the contract in the case at bar as those in the Farnham agreement? Can any such meaning as is here expressed in the Farnham contract be spelled out of the agreement to be construed in this case? By no possibility can such a meaning be given to the contract in the case at bar. Plaintiff in error could have used the land for whatever purpose he saw fit and the whole proceeds were his. Farm it, rent it for a farm, a mill site, a truck farm or a garden, and the proceeds arising therefrom would be his for all the defendants in error might say or do. When he parted with the title, then and then only the contract became operative and a sum equal to one fourth of what he sold the land for was due and owing the defendants in error.

In the case of Randall vs. Constans, the court found the agreement to be as follows:

"That the defendant should take a deed of the premises and hold the same in trust for

> the benefit of said Elizabeth C. Randall until the same could be advantageously sold; and the said defendant did duly undertake and agree to and with the said Elizabeth, to hold the said real estate in trust for her benefit, to collect the rents, pay the taxes and incumbrances thereon, and sell the same and, after deducting the difference between the sums collected, and the sums he should advance, pay over the proceeds to the said Elizabeth C. Randall."

The court holds that this agreement created a trust in lands in favor of Mrs. Randall, and that Constans held the bare, naked title for her benefit; or in other words created an interest in lands. But it will be noted that the language of the agreement is very specific in stating that the defendant "should take a deed of the land and hold the same in trust for Mrs. Randall." Under the agreement in the case at bar the plaintiff in error, was not to hold the land for any other person than himself and the only thing he was to do under the agreement was to pay to the defendants in error a sum of money equal to one fourth of whatever, he, plaintiff in error, should sell the land for.

Standing timber on land is part of the realty. Part of the land itself. Hence an agreement to convey a part of the timber is an agreement to convey an interest in land. It aliens a part of the title to the thing which is acquired when the title is obtained, hence an interest in this title. The case of Kingston vs. Eckman, *supra,* is applicable and in point in this case.

The defendants in error could not prevent the plaintiff in error from mortgaging the land. Their only remedy is to recover an amount equal to one

fourth of what plaintiff in error should receive for the land. If by the process of mortgaging the land the plaintiff in error should finally part with the title to the land or lose the land by the mortgage being foreclosed then the amount of the compensation of the defendants in error would be measured by one fourth of what the plaintiff in error actually received for the land by this process of parting with the title to the land or the sale of the same.

The only effect which an appreciation or a depreciation of the lands before sale would have upon the rights of the defendants in error would be to lengthen or shorten the instrument of measurement by which the amount they were to receive should be determined.

If the contention of the plaintiff in error is correct an action of specific performance of the contract will lie on the part of the defendants in error, compelling the plaintiff in error to convey to them one fourth of the land. But such an action will not lie and the courts have decided that such a contract conveys no interest in lands whatsoever.

King vs. Millard, 15 Rhode Island Reports, 426.

Ellsworth vs. Pomery, 26 Indiana, 158.

Gross et. al. vs. Hafemann, 91 Minn., 1.

The contract created no community of interest in lands between the plaintiff in error and the defendants in error.

Ellsworth vs. Pomeroy, 26 Indiana, 158.

An action would not lie on the part of the defendants in error against the plaintiff in error to compel him to sell the land if a purchaser could be found for the same at its proper value. Their only remedy would be, if they had any, in damages against the plaintiff in error for failure to perform the contract.

King vs. Millard, 15 R. I., 426.

By the conditions of Section 2262, *supra*, the person making the purchase of land under the preemption act had to make an affidavit, before making the purchase, "that he has not settled upon and improved such land to sell the same on speculation." The meaning of this part of the section is evident by what immediately follows, namely: "But in good faith to appropriate it to his own exclusive use." He is not prohibited from selling the land so long as he appropriates it, or what he derives therefrom, to his own use.

It never was in the contemplation of the statute that the purchaser should not sell the land. This being the case, it is not possible that the statute is contemplated to reach out and say how the purchaser shall dispose of the proceeds derived therefrom. Certain it is, that it will not be interpreted to mean, that a man should not use them to pay the obligations of an honest contract.

There is nothing in the contract in the case at bar that would make the plaintiff in error swear falsely when he said, "that he has not settled upon and improved such land to sell the same on specula-

tion, but in good faith to appropriate it to his own exclusive use."

Does the contract say that at the time the plaintiff in error took the affidavit provided for by the statute that he had taken the land to sell even, or that he had any agrement to sell it? Certainly not. It is simply a contract, the conditions of which to be performed by the plaintiff in error, are that he is to pay a certain sum of money when he shall sell the land, whether he sells it in one year or in twelve years, or whether he sells it to A., B., C., or any other person.

The only evidence in this case is the contract Exhibit "A." Hence we will make no comment as to the matter touched upon in the last paragraph of plaintiff in error's brief and argument, although it is in the realm of possibility that we might, if we chose to do so.

We respectfully submit that the judgment should be affirmed.

THOMAS J. DAVIS,
JOHN E. DAVIES,
Attorneys for Defendants in Error.

Supreme Court of the United States.

No. 64.—October Term, 1905.

Gustav E. Hafemann, Plaintiff in Error, vs. Fred A. Gross, Albert F. Gross, and Louis H. Gross. } In error to the Supreme Court of the State of Minnesota.

[November 27, 1905.]

By the admissions in the pleadings in this case, on December 1, 1890, the defendants in error, together with one Edmund F. Gross, as parties of the first part, entered into a contract with the plaintiff in error, which stipulated: "That for and in consideration of the covenants hereinafter mentioned, the parties of the first part agree to pay one-fourth of all expenses accruing to the party of the second part in making final proof to S.W. ¼ of the N.W. ¼, the N. ½, of the S.W. ¼, and the S.W. ¼ of the S.W. ¼ of sec. 14, all in township 58, north of range 19 west, in St. Louis County, Minn., and receiving title thereto, and the party of the second part agrees and binds himself to pay to the parties of the first part one hundred dollars in cash upon the delivery of these presents for locating him on said land, and he further agrees to give the parties of the first part one-fourth part of the price and proceeds that may hereafter be obtained for the sale of said land after he has obtained title thereto from the United States, deducting the one-fourth expense as above provided, and can find a purchaser for and sell the same at its proper value."

The parties of the first part fully complied with all the stipulations of this contract. The plaintiff in error, who at the time of the contract was proceeding under the pre-emption law, made his final proofs, and on December 19, 1891, received a patent. On October 18, 1895, he sold the pine timber on the land and paid to the parties of the first part one-fourth of the amount received by him therefor. Edmund F. Gross subsequently assigned to Albert F. Gross, one of the defendats in error, all of his right, title and interest in the contract. On July 17, 1902, the plaintiff in error sold and conveyed the land to the Onondaga Iron Company. This action was brought in the District Court of the county of St. Louis, Minnesota, to recover one-fourth part of the moneys received by him on said sale. Judgment was entered in the District Court in favor of the plaintiffs, 91 Minn. 1; 92 Minn. 367, which was affirmed by the Supreme Court of Minnesota, and thereupon this writ of error was sued out.

Mr. Justice BREWER delivered the opinion of the Court.

The case turns upon the construction of the contract and its alleged conflict with section 2262 R. S., the pertinent part of which is:

"Before any person claiming the benefit of this chapter is allowed to enter lands, he shall make oath before the receiver or register of the land district in which the land is situated. . . . That he has not settled upon and improved such land to sell the same on speculation, but in good faith to appropriate it to his own exclusive use; and that he has not, directly or indirectly, made any agreement or contract, in any way or manner, with any person whatsoever, by which the title which he might acquire from the Government of the United States should inure in whole or in part to the benefit of any person except himself."

The defendants in error insist that the title was to be in no manner affected by the contract; that it was simply a promise on the part of the pre-emptor to pay a certain sum of money, the amount thereof to be determined by the proceeds of a sale which he might subsequently make; that he was under no obligations to make any sale, and if he did not they would have no claim upon him. On the other hand, the plaintiff in error invokes the doctrine laid down in *Anderson* v. *Carkins*, 135 U. S. 483, that by the terms of the contract the title which he acquired from the Government was in part to inure, indirectly at least, to the other parties to the contract. He insists that the purpose of Congress was to secure to the pre-emptor the full benefit of the property patented to him; that this purpose is emphasized by the use of the words "directly or indirectly," and that any contract by which third parties were to acquire a portion of the property or a share in the proceeds of any sale of the property was really a contract which operated indirectly to transfer the title in part to such third party. Under such construction a contract by which the pre-emptor should agree to mortgage the land after acquiring title would be void, because on failure to pay and by foreclosure of the mortgage the mortgagee might acquire title.

The question is not free from doubt. The contract did not directly affect the title; that was to be absolutely vested in the patentee, undisturbed by any claim of the defendants in error. He was not bound to do anything by which any portion of the title should pass to them, directly or indirectly. On the other hand, its effect was to cast a limitation on the full benefit of the property, for while the patentee was under no obligation to sell, he was required to divide the proceeds if and when he made a sale.

It may be well to examine the decisions of the courts, Federal as well as State, and also the rulings of the Land Department. Before doing so, however, we quote the corresponding provisions of the Federal statutes respecting homesteads. Secs. 2290, 2291 and 2295 R. S. In his application for a homestead entry the applicant must make affidavit that his

"application is made for his exclusive use and benefit, and that his entry is made for the purpose of actual settlement and cultivation, and not either directly or indirectly for the use or benefit of any other person." And before a certificate or patent is issued he must make affidavit "that no part of such land has been alienated, except as provided in section 2288." That section refers to the transfer for church, cemetery or school purposes, or for the right of way of railroads. The land shall not "in any event become liable to the satisfaction of any debt contracted prior to the issuing of the patent therefor."

Under these provisions it has been held that a contract to convey the whole or part of the land made prior to the perfection of his equitable right by one seeking pre-emption or a homestead is void, will not be enforced in the courts, *Anderson* v. *Carkins, supra;* and if known to the department will prevent the passing of the legal title. Such has been the uniform ruling of the Land Department, as well as of the courts, State and Federal.

With respect to a mortgage or deed of trust executed under like circumstances, the decisions of the Land Department have been all to the effect that such mortgage or deed of trust is not an alienation within the scope of the homestead statute or forbidden by the pre-emption law, especially where, in the case of a pre-emption, the mortgage is given to secure money borrowed to complete the purchase of the land. See, in reference to pre-emptors, *Larson* v. *Weisbecker*, 1 L. D. 409, Opinion of Secretary Teller; *In re William H. Ray*, 6 L. D. 340, Opinion of Acting Secretary Muldrow; *Haling* v. *Eddy*, 9 L. D. 337, Opinion of Secretary Noble; *Murdock* v. *Ferguson*, 13 L. D. 198, Opinion of Secretary Chandler. With reference to a homestead entryman, see *Mudgett* v. *Dubuque & Sioux City R. R. Co.*, 8 L. D. 243, Opinion of Secretary Vilas; *Dawson* v. *Higgins*, 22 L. D. 544, Opinion of Secretary Smith; *Kesar* v. *Horde*, 27 L. D. 148, Opinion of Secretary Bliss. In addition, see *Lawson* v. *Reynolds*, 28 L. D. 155, in which Secretary Hitchcock held that a "written agreement executed by a homesteader and operating as a mere lease of part of the premises and the grant of an easement, the use of which would tend to improve the value of the land as a homestead, is not an alienation of any part of such land and no bar to the perfection of the entry." See also *Kingston* v. *Eckman*, 22 L. D. 234, in respect to an entry under the timber and stone act of June 3, 1878, (20 Stat. 89,) as amended by the act of August 4, 1892, (27 Stat. 348,) the provisions of which statute in reference to the oath of the applicant are similar to those in the pre-emption act.

There has been some division in the courts upon the question. In *Brewster* v. *Madden*, 15 Kan. 249, the Supreme Court of that State, in an opinion delivered by the writer of this, held that a mortgage given by a pre-emptor prior to the entry of the lands was void, reaching this conclusion

largely on the proposition that at the time the pre-emption act was passed (1841) mortgages always in form conveyances were then regarded by the profession generally as conditional alienations. To like effect were the early rulings of the Supreme Court of Minnesota, *McCue* v. *Smith*, 9 Minn. 252; *Woodbury* v. *Dorman*, 15 Minn. 338, though these rulings were subsequently distinctly overruled by the same court. *Jones* v. *Tainter*, 15 Minn. 512; *Lang* v. *Morey*, 40 Minn. 396. *Bass* v. *Baker*, 6 Mont. 442, deciding the same way, was also overruled in *Norris* v. *Heald*, 12 Mont. 282. The large majority of State decisions follow these later rulings. See, in case of pre-emptions, *Wilcox* v. *John*, 21 Col. 367; *Christy* v. *Dana*, 34 Cal. 548; *Christy* v. *Dana*, 42 Cal. 174; *Camp* v. *Grider*, 62 Cal. 20; and in reference to homesteads, *Fuller* v. *Hunt*, 48 Iowa, 163; *Dickerson* v. *Bridges*, 147 Mo. 235; *Weber* v. *Laidler*, 26 Wash. 144; *Spiess* v. *Newbery*, 71 Wis. 279; *Kirkaldie* v. *Larrabee*, 81 Cal. 455; *Orr* v. *Stewart*, 67 Cal. 275; *Stark* v. *Duvall*, 7 Okla. 213. In *Orrell* v. *Bay Manufacturing Company*, 83 Miss. 800, the court held that the prohibition of the alienation of public land by parties who have taken the preliminary steps to acquire the same under the homestead laws, and who have not perfected their entries, has reference to an absolute sale of the land, or some part of it, and in that case the leasing of trees on the land for turpentine purposes and the sale of trees was held not an alienation within the meaning of the statute.

Obviously, the trend of the authorities is strongly in favor of the proposition that a mortgage or deed of trust by one seeking an entry under the pre-emption or homestead laws of the United States, made prior to the perfection of his equitable right, is valid. These authorities would fully sustain the decision of the Supreme Court of Minnesota in the present case.

Further, in the case at bar, there was no mortgage, deed of trust or agreement for a specific lien of any kind. It was simply a promise to pay money in case of a sale by the patentee, the amount of the payment to be determined by the sum received on the sale. It was a promise which in no event could be enforced against the land. It was only a personal obligation of the patentee. It might never be enforceable against him, and could not be except upon his sale of the land. Of course, it would not be contended that a mere promise to pay money by one seeking to acquire title under a homestead was not binding, and if the only effect of the contract is to measure the sum which the patentee agrees to pay by that which he may receive when he sells the land, it cannot be held that a contract has been made for an alienation of the title in whole or in part, or that the land was not acquired for the sole use and benefit of the patentee.

The judgment of the Supreme Court of Minnesota was right, and it is

Affirmed.

Supreme Court of the United States.

No. 64.—October Term, 1905.

Gustav E. Hafemann, Plaintiff in Error, vs. Fred A. Gross, Albert F. Gross, and Louis H. Gross. } In error to the Supreme Court of the State of Minnesota.

[November 27, 1905.]

Mr. Justice White, with whom concur Mr. Justice McKenna and Mr. Justice Holmes, dissenting:

The power to evade the restrictions imposed by Congress upon the right to acquire land by pre-emption, which it seems to me must result from the construction now given to the act of Congress as applied to the contract in controversy, causes me to state the reasons for my dissent.

There is no controversy as to the applicable statute, and no question of fact as to the existence and terms of the contract. The bald question, therefore, is, Was the contract in conflict with the requirements of section 2262, Rev. Stat.?

By that section the pre-emptor, before being allowed to enter land, was obliged to make oath, as follows:

" . . . That he has not settled upon and improved such land to sell the same on speculation, but in good faith to appropriate it to his own exclusive use; and that he has not, directly or indirectly, made any agreement or contract, in any way or manner, with any person whatsoever, by which the title which he might acquire from the Government of the United States should inure in whole or in part to the benefit of any person except himself; . . ."

By the contract here in question, which was entered into prior to the making of the statutory affidavit, the defendants in error, and one other person—whose interest has since been acquired by one of the defendants in error—agreed to pay one-fourth part of the expenses of the plaintiff in error, the proposed pre-emptor, to be incurred by him in perfecting his entry, he, on the other hand, agreeing to pay one hundred dollars in cash "for locating him on said land," and binding himself to give to the other parties to the agreement "one-fourth part of the price and proceeds that may hereafter be obtained for the sale of said land after he has obtained title thereto from the United States, deducting the one-fourth expense as above provided, and can find a purchaser for and sell the same at its proper value."

My mind cannot perceive how this contract can be held valid, testing its provisions by the statutory prohibitions, for it is settled that the requirement of specific statements in the affidavit implies a prohibition against the doing of that which the pre-emptor must swear in the affidavit that he had not done.

Let me consider what the statute thus requires the pre-emptor to swear, in connection with the contract, in order to test the conflict between them. The pre-emptor must swear "that he has not settled upon and improved such land to sell the same on speculation, but in good faith to appropriate it to his own exclusive use." Could this statement have been truthfully made in view of the agreement by which the pre-emptor bound himself after his purchase, if he sold the land, to pay to the other parties to the contract one-fourth part of the purchase price? Further, the statute requires the pre-emptor to swear "that he has not, directly or indirectly, made any agreement or contract, in any way or manner, with any person whatsoever, by which the title which he might acquire from the Government of the United States should inure in whole or in part to the benefit of any person except himself." Was the affidavit made by the pre-emptor in this case true when, at the time it was made, he had executed a contract or agreement by which, when the property was sold, one-fourth of the price should go to the benefit of the other parties to this contract? Concede that technically the contract did not purport to be an agreement on the part of the pre-emptor to convey the legal title to one-fourth part of the land to the other parties to the agreement, can it in reason be said that the agreement did not directly or indirectly provide that the title when acquired should inure in whole or in part to the benefit of other contracting parties? To my mind the statute seems so plain and the terms of the contract to be so clearly in violation of its provisions that there can reasonably be no room for construction.

But it is said the statute simply prohibits agreements on the part of the pre-emptor, by which the title which he might acquire would inure in whole or in part to the benefit of any other person than himself, therefore, to constitute a violation of the statute, it must be found that the contract bound the pre-emptor, after he had acquired the land, to convey a one-fourth interest in the title to the land. But this disregards the fact that the statute expressly forbids the doing of the prohibited thing, either "directly or indirectly," and prohibits "any agreement or contract," in any way or manner whatsoever, by which the title to be derived from the Government of the United States should inure, in whole or in part, to the benefit of any person except the pre-emptor. It is clear, to my mind, that the words "directly or indirectly and in any manner" were obviously intended to embrace evasions and subterfuges by which the policy of the statute might be frustrated—that is, the prohibition against giving to

another person than the pre-emptor the benefit, in whole or in part, of the results of acquiring the land from the United States.

In *Anderson* v. *Carkins*, (135 U. S. 483,) dealing with an affidavit of a homesteader, where the requirements were less stringent than exacted in pre-emption cases, it was decided that the existence of an agreement to convey after patent a part of the land to another was void as against public policy. To me that case is decisive of this. It is said, however, there the obligation was to convey the land, whilst here there was no obligation on the part of the pre-emptor to convey or to sell the land after he acquired it, but only an obligation if he did sell to pay the one-fourth of the proceeds. But it cannot be meant by this to say that there was no contract, because the agreement was so purely potestative on the part of the pre-emptor as not to imply an obligation, since the contract is enforced by the decree now rendered. Suppose, however, that the contract could be divided and held to imply an obligation to pay over to another a portion of the purchase price, after the obtaining of a patent, only in case the pre-emptor chose to sell, does such construction relieve the contract from the prohibitions of the statute? It seems to me not, because to so hold would simply be to permit mere form and not substance to control. In *Pollock* v. *Farmers' Loan & Trust Co.*, (157 U. S. 429,) the question was whether Congress could, in levying an income tax, include as part of the taxable income revenues derived from real estate. It was held that it could not be done, because substance was to control, and that to include rents in the income taxed was to impose a direct burden on the owner of the real estate. After quoting from Co. Lit. 45, the declaration "For what is the land but the profits thereof," and a passage in Jarman on Wills, stating that a devise of the rents and profits or of the income of lands passes the land itself, both at law and in equity, the court said (p. 58):

"The real question is, is there any basis upon which to rest the contention that real estate belongs to one of the two great classes of taxes, and the rent or income which is the incident of its ownership belongs to the other? We are unable to perceive any ground for the alleged distinction. An annual tax upon the annual value or annual user of real estate appears to us the same in substance as an annual tax on the real estate, which would be paid out of the rent or income."

This being the rule settled by this court, simply as to the right to receive the fruits of real estate, I do not perceive why, in view of the sweeping prohibitions of the act of Congress, the existence of a continued obligation to pay over the price of real estate to another person when sold, does not amount to an agreement giving to such person, at least indirectly, an interest in the land itself.

Having said that, in my opinion, there was no ambiguity in the statute as applied to the contract, it seems to me unnecessary to consider the

decided cases. But I refer briefly to them. True it is that there are rulings of State courts and of the Land Department, holding that an agreement to execute a mortgage upon pre-empted land is not within the prohibition of the statute. When the opinions so holding are analyzed it will be seen that they proceed upon the theory that the spirit of the statute does not embrace transactions of that character. For the purposes of this case, however, it does not seem to me essential to say whether or not such rulings are correct, as an agreement to mortgage to repay a given sum advanced, to enable the pre-emptor to improve the land, might well be held not to be within the spirit of the prohibitions of the statute, and yet such rulings would not be controlling as to an agreement like the one here in question, especially if the contract is construed as amounting to a perpetual obligation to transfer to a third person upon a sale of the land a given portion of the price. Such a contract at once puts the person in whose favor it is made in the attitude, not of a lender entitled to receive back his loan with simple interest, but in the position of a speculator who is to benefit from the enhancement in value of the land which may arise in the future, without reference to the amount of any expenditure by him made, a character of transaction which it was the express purpose of the act of Congress to forbid. (*Myers* v. *Croft*, 13 Wall. 295.) And from another point of view such a transaction puts the pre-emptor making it in a position where his plain interest is not to improve and develop the land to its full capacity, because the labor expended for that purpose would ultimately inure in case of a sale of the land to the benefit of a third person.

Deeming that the contract in question was within the prohibitions of the act of Congress and void as against public policy, I do not think the court should lend its aid to its enforcement, and I therefore dissent, and am authorized to state that Mr. Justice McKenna and Mr. Justice Holmes concur therein.

True copy.

Test:

Clerk Supreme Court, U. S.